NO. 11913

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

GEORGE HARRISON MEEKS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellee's Brief

On Appeal From the District Court for the Territory of Alaska, Division Number One.

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INDEX

STATUTES CITED

CASES CITED

TEXTBOOKS

~~DRAFT~~

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PRELIMINARY STATEMENT

Appellant, who was the defendant below, was convicted of the crime of Murder in the First Degree in violation of Section 4757, Compiled Laws of Alaska, 1933, and on appeal to this Court said Judgment of Conviction was reversed. *Meeks vs. United States*, No. 11293, 163 F 2d 598 (CCA-9, 1947). Folowing a retrial in the District Court for the Territory of Alaska, Division Number One, at Juneau, the appellant was again adjudged guilty of the crime of First Degree

Murder based upon the verdict of a jury pursuant to which appellant was sentenced by the Honorable George W. Folta, presiding, to imprisonment for life.

FACTS

On Monday, December 10, 1945, the body of Clarence J. Campbell was found in a ditch on the outskirts of the City of Juneau, Alaska. There were cuts and bruises on his head and face and a very deep laceration of his throat which completely severed the trachea and left carotid artery.

The victim, Campbell, who was a contract shingler, had arrived in Juneau only a few days before his death, from Hoonah, Alaska, to do shingling on the new Juneau Federal Housing Development Project. Campbell was known to have been carrying on his person slightly more than $2100.00 consisting mostly of hundred dollar bills and a smaller number of fifty dollar bills on Saturday and Sunday, December 8 and 9, 1945; but when his body was found on the following day, December 10 ,1945, several of his pockets were turned inside out, and all of his money as well as his wrist watch was missing.

Meeks, the appellant, was shown to have been in Juneau since the latter part of October, 1945, and to have been without funds and borrowing money to live on up until Sunday evening, December 9, 1945, the day before Campbell's body was discovered and shortly after he was seen in company with Campbell. The

purely fortuitous discovery of this money in appellant's possesion was not only tremendously significant because of the amount being similar to that stolen from Campbell, but it was also in the same denominations as the bills Campbell was possessed of prior to his being robbed and murdered. The appellant even borrowed money from one Eddie Schwaesdall to pay for his transportation to Juneau, although after the murder he lied about this to a Federal investigator and wrote to Schwaesdall requesting him to deny making the loan if questioned about it. Appellant requested an advance on wages due him from a temporary job and received the total amount due him, namely $8.00, on December 8, 1945. In making request for this advance after working only one day he stated to his employer that he was broke and needed money for food over Sunday, December 9, 1945. Also on Saturday, December 8, 1945, appellant propositioned one Kelso Hartness, suggesting that they hit "a big shot from Hoonah" over the head and take away his money as this man had over two thousand dollars in hundred and fifty dollar bills.

The discovery hereinabove referred to of a large amount of money in appellant's possession was quite by chance, and was made at about 9:30 on the night of December 9, 1945, while Juneau Police Officers were investigating a disturbance at the Keystone Rooms in response to a call by the landlady. It was discovered at this time that appellant Meeks had in his possession a large number of hundred dollar bills

and Meeks gave the officers a one hundred dollar bill "for their trouble." Later that night he displayed seventeen one hundred dollar bills, four fifty dollar bills, two twenty dollar bills and two ten dollar bills, to Kelso Hartness and Lena Brown, according to the testimony of these persons, as well as appellant's own admission. Hartness also testified that on the same Sunday evening, December 9, appellant, after displaying the money in a boastful manner, borrowed a clean shirt from Hartness and the two of them went to the public toilet down the hall and there Meeks removed his shirt which had blood stains on it and put on the shirt he borrowed from Hartness after tearing up his own and flushing it down the toilet. Percy Reynolds, the owner-operator of a restaurant in Juneau, testified that late Sunday evening, December 9, 1945, Kelso Hartness, whom he knew by his having worked for him and eaten at his restaurant, came to his restaurant and during his purchase told him (Reynolds) of a fellow being up in his room with a whole lot of money, over $1900.00.

In addition, it was shown that appellant knew the deceased who had the adjoining room to him in the Keystone Rooms in Juneau; that the two were together on Sunday evening, December 9; that they were seen at about 7:00 P.M. walking together in the direction where Campbell's body was found; and that at about 7:30 P.M. two people answering their description as to size were seen approaching the lonely spot where Campbell's body was discovered. Later Meeks

denied ever knowing Campbell, and attempted to pay for the transportation of one John Kalinowski, who had seen the two together, in order to have Kalinowski leave town so he could not testify.

On Monday, December 10, 1945, when Meeks was questioned as to the money which he had acquired so suddenly the previous night, a pair of wet trousers was found in his room. Appellant said he had washed these trousers and was going to send them to the laundry. Later it was discovered that there were human blood stains covering a large area of these trousers though the stains were too thin to type due to the washing. Human blood stains were also found on appellant's suit coat.

Shortly after the murder Meeks gave Nathan Skinner a Hamilton wrist watch in payment for a debt, telling Skinner to tell the "F.B.I." it was a watch given him by Meeks before the murder. This Hamilton wrist watch was proved by eye witnesses and by pawn records to have been the property of deceased, and the watch he was wearing up to and just prior to the time his body was discovered.

It was on the evidence outlined above and numerous other circumstances that the appellant was convicted by the verdict of a jury on his re-trial in the District Court for the Territory of Alaska at Juneau of First Degree Murder (without capital punishment), in violation of Section 4757, C.L.A. 1933; Section 65-4-1, A.C.L.A. 1949.

ISSUES

I

NO ERROR WAS COMMITTED BY THE TRIAL COURT IN PERMITTING THE PROSECUTION TO EXAMINE ONE OF ITS WITNESSES WITH REFERENCE TO HIS PRIOR CONVICTION OF A FELONY.

Appellant contends that the Trial Court committed prejudicial error in permitting the prosecution to examine in chief Government witness Kelso B. Hartness as to his previous criminal conviction, notwithstanding the fact that the defendant made no objection to this questioning and notwithstanding the further fact that on cross-examination defendant's attorneys examined witness Hartness on the same subject much more fully than the Government on its examination in chief. On cross-examination of Hartness defense attorneys were permitted by the Trial Court to go into the question of punishments and conditions of sentences, including the questioning of Hartness as to his being under control of law enforcement authorities at the time of his testifying. (Tr. 507, lines 7, 8 and 9) (Tr. 507, line 20) (Tr. 508, lines 8 to 11 incl.)

Of the two grounds advanced by appellant in support of his contention the first is based on the fact that a party who calls to the stand a witness cannot impeach that witness, and quotes The Alaska Territorial Statute, Section 58-4-59, Alaska Compiled Laws Annotated, 1949.

Whether or not and under what circumstances a party to litigation may be permitted to impeach his own witness has from the earliest times been a subject of much controversy and of many decisions. 58 Am. Jur. Sec. 792, p. 438. In this country the general rule is well established, that subject to certain exceptions a party may not impeach his own witness. It is respectfully submitted that the circumstances in this case come within one of the exceptions to the general rule stated above.

One of the reasons advanced in support of the rule that a party cannot ordinarily impeach his own witness is that in calling the witness the party vouches for his credibility. But this reason and the rule grounded on it can have no application where the calling of the witness is not voluntary. In fact, a witness whose calling is not voluntary can hardly be called the party's witness—*United Staes v. Hall*, 44 F 864; 10 LRA 324—but is rather a witness of the law. So a party may impeach a witness whom he is compelled to call, or whom by legal intendment he cannot avoid calling, as in the case of an attesting or subscribing witness to a deed or a will.

> *Thompson v. Owen*, 174 Ill. 229, 51 NE 1046
> *Williams v. Walker*, 19 S.C. Eq. (2 Rich) 291, 46 Am. Dec. 33

Likewise, the prosecution in a criminal case may impeach a witness whom it is under a legal duty or obligation to call. Ann. Cases 1914 B 1122, 1123, such

as an available witness to the crime, a witness who has testified before the grand jury, or a witness whom the court compels the prosecution to call. 58 Am. Jur. Sec. 795.

Since a witness whom a party is compelled by law to call or a witness to a crime in a criminal prosecution is not regarded as his witness within the rule which prohibits a party from impeaching his own witness, he may be impeached by such party in the same manner as any other witness. Under this exception to the general rule it has been held that where the prosecution is compelled by the court to put a certain witness on the stand, it may impeach him. *United States v. Hall*, 44 Fed. 864. Also, the obligation of the prosecution to call on the trial a witness who testified before the grand jury has been held to be such as to relieve it from the operation of the rule forbidding impeachment. *Commonwealth v. Morrow*, 3 Brews. (Pa) 402. Similarly, it has been held that it is the duty of the prosecution in a criminal case to produce every available witness to the crime, and the rule forbidding the impeachment of one's own witness has accordingly no application in such cases.

People v. Elco, 131 Mich. 519, 91 N.W. 755, 94 N.W. 1069

State v. Slack, 69 Vt. 486, 38 Atl. 311

Announcing this rule, the court said in the case last cited:

> As the public, in whose interest crimes are prosecuted, has as much interest that the innocent should be acquitted as that the guilty should be convicted, we hold it to be the duty of the State to produce and use all witnesses within reach of process, of whatever character, whose testimony will shed light upon the transaction under investigation and aid the jury in arriving at the truth, whether it makes for or against the accused, and that therefore the State is not to be prejudiced by the character of the witnesses it calls.
>
> *State v. Magoon,* 50 Vt. 333
> *State v. Harrison,* 66 Vt. 523

This doctrine, carried to its logical result, exempts the state in criminal cases from the operation of the rule in question, and places it in the position of a party calling an instrumental witness, and for the same reason.

In the case at bar not only was Hartness a witness before the grand jury which indicted the appellant but he was one of the principal witnesses for the plaintiff Government and the only one giving direct testimony of premeditation. Prosecutions are carried on by the Government, through the agency of sworn officers elected or appointed for that purpose, who have no private interests to serve nor petty spites to gratify, but whose sole and only duty is to faithfully execute their trust, and do equal right and justice to the Government and to the accused.

In the case of *Arnold v. United States*, decided in 1938 by the United States Circuit Court of Appeals for the 10th Circuit and reported in 94 F 2d 499, we have a case wherein the United States Attorney in a criminal prosecution interrogated two Government witnesses on their examination in chief concerning their prior convictions of a felony. On cross-examination, when questioned by appellants' counsel as to what felony they had been convicted of, on objection by the United States Attorney, the court sustained same and denied the information as to what felony they had committed. As can be readily understood from a review of the authorities the trial court was reversed for so ruling, but no objection or exception whatsoever was taken to the question of the right of the United States Attorney to examine in chief Government witnesses concerning previous felony convictions and it is respectfully contended that no error was committed in the case at bar in permitting the Assistant U. S. Attorney, where no objection was made, to ask Government witness Hartness on his examination in chief as to his previous conviction of a felony, especially where on cross-examiation of the witness defendant's attorneys questioned witness Hartness minutely on the same matter, bringing out the name of the crimes, the sentences and conditions in connection therewith.

In the case of *People v. Minsky*, 227 N.Y. 94, 124 N.E. 126, which was cited with approval in *People v. Carnavelle*, 196 NYS 56, the rule is stated as follows:

> The law does not limit a party to witnesses of good character, *nor does it compel a party to conceal the bad record of its witnesses from the jury*, to have it afterwards revealed by the opposing party with telling effect. Such a rule would be unfair alike to the party calling the witness and the jury. Men have been convicted of murder in the first degree by the evidence of admittedly dangerous and degenerate witnesses, law breakers, and professional criminals. *People v. Becker*, 215 N.Y. 126, 109 N.E. 127; 210 N.Y. 274, 104 N.E. 396. (Emphasis supplied.)

With reference to the appellant's further contention that proceedings, orders, judgments, and decrees of a court of record cannot be proved by parol, it is submitted that its argument is inapplicable to the facts in issue and deals with the question concerning the general theory of the rule of law against varying the terms of a writing, which is the precise title of Section 2425, Volume IX, of Wigmore on Evidence cited by appellant at the outset of its argument on this subject. Further, appellant's argument on this subject is not germane as the question of proving *terms* of a contract or other document is not here in issue. No attempt was made in this case to vary the terms of a written contract or judicial record, the only question being whether a judgment of a conviction against the witness existed. It is further submitted that no clearer authority concerning the precise point in issue can be found outside of this court's ruling in *Meeks v. United States*, (CCA-9) 163 F 2d 598, when it reversed the

judgment of a conviction for the trial court's refusal to permit alternative methods to be used in showing the prior conviction of a witness. It is submitted that a criminal conviction of a witness may be established by alternative methods, namely, by his examination or by the record of the judgment of conviction.

Meeks v. United States, Supra.

Also the existence of a writing as distinct from its contents may be proved by parol,—22 C.J. Sec. 1227, P 986—and where the matter to be proved is a substantive fact which exists independently of any writing, although evidenced thereby, and which can be as fully and satisfactorily established by parol as by the written evidence, then parol evidence may be admitted regardless of the writing.

22 C.J. Sec. 1227, P 983, 984.

II

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN LIMITING THE CROSS-EXAMINATION OF GOVERNMENT WITNESS KELSO B. HARTNESS AND IN REFUSING TO ADMIT EVIDENCE OF A COLLATERAL ASSAULT.

Appellant complains in his second assignment of error that the Court erred in not permitting defendant

to cross-examine Government witness Kelso B. Hartness as to the particulars of appellant's assault on Hartness January 8, 1946, which was the subject matter in a separate case entitled *United States v. George Harrison Meeks,* No. 2417-B in the District Court for the Territory of Alaska. In this case Hartness was the complaining witness and stated under oath that Meeks assaulted him with a dangerous weapon and inflicted numerous wounds with a knife about his neck, throat and arms. Further witness Hartness testified under oath in the original trial of instant case (original trial Tr. P. 461 to 473) relative to that matter. All of the testimony, without equivocation shows appellant to have been the assailant. That offense occurred approximately one month after the murder of Clarence Campbell, for which appellant was on trial, and thus the facts were wholly independent and collateral to the case at bar.

Wright v. City of Anniston (Ala.) 44 So. 151
State v. Coleman (Sup. Crt. N. C.) 2 S.E. 2d 865
Riddle v. United States (CAA-5) 279 F 216, Cer. Den. 259 U.S. 586.

The subject matter, i.e. fight between appellant and witness Hartness in the Gastineau Hotel January 8, 1946, in which appellant inflicted some 27 wounds with a knife, was not inquired into by the Government on direct examination. Therefore the details of that affray were not within the limit and scope of proper cross-examination of Witness Hartness.

Sec. 58-4-58, A.C.L.A. 1949.

58 Am. Jur. p. 349, Sec. 629, Notes 14 and 15.

People v. Louis Berardi, et al, (Sup. Crt. Ill.) 163 N.E. 668

Harrold v. Territory of Oklahoma (CCA-8) 169 F 47

Aplin v. United States (CCA-9) 41 F 2d 495

Kettenbach, et al. v. United States (CCA-9) 202 F 377, 387

McRaye v. United States (CCA-9) 163 F 2d 868

Tucker, et al v. United States (CCA-8) 5 F 2d 818

United States v. Manton, et al, (CCA-2) 107 F 2d 834, 845, Cer. Den. 309 U.S. 664, wherein it is said "The office of cross-examination is to test the truth of the statements of the witness made on direct; and to this end it may be exerted directly to break down the testimony in chief, to affect the credibility of the witness, or to show intent. The extent to which cross-examination upon collateral matters shall go is a matter peculiarly within the discretion of the trial judge. And his action will not be interfered with unless there has been upon his part a plain abuse of discretion."

The fight between appellant and Hartness on January 8, 1946 is relevant to the case at bar, only in so far as Hartness, being the victim to the assault by appellant, acquired an ill feeling, became biased and hostile, or prejudiced against appellant as a result of the assault, and such ill feeling, bias, hostility, and

prejudice influenced his testimony regarding the guilt or innocence of appellant.

A careful review of the transcript (Tr. Vol. 3, P. 499-524) clearly reveals that appellant sought to place before the jury not the fact of the assault, but the particulars of the collateral offense. That is all that was objected to by the government, and all that the Court ruled out. Obviously appellant was seeking to impeach and discredit witness Hartness' testimony by showing his bias, hostility and prejudice. In such case, the material point was the existence of feeling, bias, hostility and prejudice toward appellant, and not the right or wrong or merits of the transaction which occasioned it.

58 Am. Jur. P 387, Sec. 715, Note 18

United States v. Ball, 163, U.S. 662

Vassar v. Chicago, B. & Q. Ry. Co. (Sup. Crt. Neb.) 236 N.W. 189, 74 A.L.R. 1154

The only purpose in admitting such testimony in evidence is to enable the jury to weigh and appraise the pertinent facts related by the witness, in the light of his existing hostile feelings, bias and prejudice. Inquiry into this fact, however, does not open up the entire field which motivates the lives of witnesses. Some men would remain friendly in spite of utmost harrassment, while others acquire bitter feelings at the slightest provocation. The only safe standard which the law has devised is whether bias, prejudice and hostile feeling exist, and the extent thereof.

When Hartness' hostile attitude was revealed as near as it actually existed, described as feeling "unkindly", "unfriendly", "just unfriendly toward him; that is all", and not "bitter", but unfriendly (Tr. Vol. 3, p. 518, 519), further examination into the details of the collateral offense ceased to be material and objections thereto were properly sustained.

The rule is well stated in *State v. Bissell* (Sup. Crt. Vt). 170 Atl. 103 where it is said that "ill will or unfriendly feelings of a witness may be shown by a general inquiry whether the witness is friendly or otherwise; but the question is so collateral to the issue that details will not be permitted to be shown." The Court held that refusal to permit the witness for the state to answer whether he tried to reverse a collect telephone call and refuse to accept same, was not error.

State v. Baird, (Sup. Crt. Vt.) 65 Atl. 101

Pandula v. Fonseca, (Sup. Crt. Fla. Sec. B) 199 So. 358

A similar rule was expressed by the Supreme Court of the United States in *United States v. Ball* 163 U.S. 662, a murder case, in which the trial court's limitation on cross examination of two government witnesses as to their bias and prejudice was upheld. The Court said: "The court permitted defendant's counsel, for the purpose of showing bias and prejudice on the part of these witnesses, to ask them whether they had, at their own expense, employed another attorney

to assist the District Attorney in the prosecution of the case; and they frankly answered that they had. That fact having been thus proved and admitted, the further question to one of them 'how much do you pay him' might properly be excluded by the presiding judge as immaterial."

In general, it may be said, the fact of a relationship or circumstance from which hostility may reasonably be inferred may be shown, but not its details.

Thus, where a feeling of hostility of the witness against the defendant, because the latter as an attorney had prosecuted the witness' two sons for arson, was admitted, a further inquiry as to whether one of the sons had not pleaded guilty was held irrelevant. *Riddle v. United States*, (C.C.A.-5) 279 F 216, Cer. Den. 259 U.S. 586. No error was committed by the trial court in sustaining objections to the question propounded by defendant to a state witness on cross examination " 'Is it not true that you carried Harry Wright out of the store into the street, and knocked, choked and abused him before you left the store,'— for the obvious reason that it called for the particulars of the difficulty." *Wright v. City of Anniston* (Sup. Crt. Ala.) 44 So. 151.

A case particularly in point is *Perkins v. State* (Sup. Crt. Ark.) 271 S.W. 326, in which error was assigned because the court refused to allow the state witness to state the particular matter which caused her to have ill feeling against defendant. She was asked whether

she had "ill" feeling against defendant and answered "No." Then she was asked if she "disliked" him and repied that she did. In approving the exclusion of further examination into the matter the court said "This was sufficient and the court did not err in refusing to allow her to be asked the particular matter which caused her to dislike the defendant. Her dislike of him, and not the reason for it, would be the cause which might affect her credibility as a witness."

People v. Vertrees, (Sup. Crt. Cal.) 146 Pac. 890, and *McDuffie v. State*, (Sup. Crt. Ga.) 49 S.E. 708 are directly in point with the preceding case as well as the case at bar, and sustain the ruling of the trial court.

In the trial of any case the court enjoys considerable discretion to see that the trial is conducted in an orderly manner, to avoid delay, and prevent collateral issue getting before the jury. The extent of cross examination of a prosecuting witness as to interest, bias, hostility, prejudice and collateral issues is especially discretionary with the court, and it is generally said the Court's rulings will not be disturbed on appeal in the absence of abuse.

Lau Fook Kau v. United States (CCA-9, 34 F 2d 86.

Bailey et al v. State (Sup. Crt. Ala.) 53 So. 296

People v. Michaels (Sup. Crt. Ill.) 167 N.E. 857

State v. Henry (Sup. Crt. Wash.) 254 P. 460

St. Louis & San Francisco Railway Co. v. Bishop, (Sup. Crt. Ark.) 33 S.W. 2d 383; Cert. Den. 283 U.S. 854

State v. Hines, (Sup. Crt. Ore.) 34 P. 2d 921

Hackins v. State (Sup. Crt. Ala.) 103 So. 468

Vassar v. Chicago, B. & Q. Ry. Co. (Sup. Crt. Neb.) 236 N.W. 189, 74 A.L.R. 1154

Pandula v. Fonseca, (Sup. Crt. Fla. Sec. B.) 199 So. 358

Eldridge v. State, (Sup. Crt. Fla.) 9 So. 448

Examination of the testimony which appellant expected to solicit from cross examination of witness Hartness (Tr. Vol. 2 p. 499 to Vol. 3, p. 518) as revealed in the transcript of the first appeal (Original trial Tr. 461 to 473) reflect appellant was the aggressor and inflicted some 27 wounds on witness Hartness with a knife. Some of these wounds were about the neck and throat. Peter Vincent, another Government witness, testified, without objection, appellant threatened to cut his throat and actually swung at him with a knife (Tr. Vol. 2, p. 297-299). The instrument used in the assault on Hartness could easily be inferred by reasonable jurors to be similar to the instrument used in the murder of Clarence Campbell, he having died from severe lacerations about his head and throat. (Tr. Vol. I, p. 176-189.) If such facts tend to magnify Hartness' ill feeling and hostile attitude toward appellant more than was expressed in his own words, he knowing the state of his own mind better than anyone else, it is difficult to comprehend how revelation of the facts before the jury would not also prejudice their minds adversely to appellant's interest. Particularly is this true when considered along with evidence that

appellant did not want the police to know he had $1500 (Tr. p. 341); and asked John Kalinowski to leave Juneau so he wouldn't testify against appellant, (Tr. Vol. 3, p. 638, 644, 670.) The details of that collateral offense reflect a course of conduct on the part of appellant, conduct of violence, by use of knives in cutting men's throats without cause, to say nothing of justification, with the apparent intent to kill and prevent Hartness from testifying against him. (Tr. Vol. 2, p. 491-492). Avoidance of this undue prejudice is all the more reason why the Court should have sustained objections to the offered testimony, and in doing so, it is respectfully submitted, that the Court did not commit prejudicial error.

Wigmore on Evidence, 3rd Ed. Vol. 3, p. 508, Sec. 951 in discussing the details of quarrels between a witness and a party on cross examination explains that in ascertaining the state of feeling from a quarrel "inconvenience may ensue in two ways: (1) the detailed inquiries, the denials, and the explanations, are liable to lead to multifariousness and a confusion of issues; (2) the detailed facts of the dispute may involve a prejudice to the character of the witness *or of his opponent,* (emphasis added) which it would be desirable to keep out of the case. From this point of view, some line of limitation must be drawn, and an effort made to avoid these drawbacks . . . . Accordingly, it is commonly held that the details of the quarrel or other conduct may be excluded, in the trial Court's discretion." Cases supporting this view and which hold that the details

of an affray, altercation between a person accused of crime and a witness for the prosecution are collateral and irrelevant and may not be shown for the purpose of proving the witness' bias, prejudice and hostility are as follows:

Clark v. State (Crt. Cr. App. Tex.) 148 S.W. 801

Figueroa v. State (Crt. Cr. App. Tex.) 159 S.W. 1188

Lau Fook Kau v. United States, (CCA-9) 34 F 2d 86

Sneed v. State (Sup. Ct. Ariz.) 14 P. 2d 248

People v. Vertrees, (Sup. Ct. Cal.) 146 P. 890

McDuffie v. State (Sup. Ct. Ga.) 49 SE. 708

Sasser v. State (Sup. Crt. Ga.) 59 S.E. 255

Eugee v. State, (Sup. Ct. Ga.) 126 S.E. 471

People v. Strauch (Sup. Crt. Ill.) 93 N.E. 126

The argument that Hartness' motive for testifying in instant case was so appellant would be convicted and he would not have to testify in *United States v. George Harrison Meeks*, No. 2417-B is simply fallacious. If he was fearful of committing perjury by stating the details of that offense consistent with the complaint against appellant in that case, he had already done so, for he had sworn to the fact of the assault in the criminal complaint, and also testified in the first trial of this case as to the facts of that case in detail. (Original trial Tr. p. 461-473) Futhermore, counsel for appellant in arguing the point before the Court (Tr. Vol. III, p. 522-523) suggested "His

motive for testifying in this case is so he will be convicted on the murder charge and No. 2417-B will never have to come up . . . " Witness Hartness interrupted and answered this by saying "That is not my motive." (Tr. Vol. III, p. 523, line 16). That adequate opportunity to examine witness Hartnes as to his interest, fear of arrest, bias, hostility, friendship and motive is apparent from the recorded testimony (Tr. Vol. III, p. 502-513, 516, 518, 520-524). If there was failure in this regard it was because counsel did not pursue the subject in a direct and forthright manner. (Tr. Vol. III, p. 517-518, 520-524).

III

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN DENYING DEFENDANT'S MOTION TO SUMMON DEFENSE WITNESSES TRAFTON, MATHEWSON, AND PETERSON.

Rule 17 (b) of the Federal Rules of Criminal Procedure require that motions to subpoena witneses for defendants at Government expense be supported by affidavit stating the testimony expected of each witness, "and shall show that the evidence of the witness is material to the defense." The showing required by this rule to justify such relief is the same as that exacted by 28 U.S.C.A. 656, namely: Name and address of each witness, testimony expected, that the evidence is material to the defense, that defendant cannot safely

go to trial without the witnesses, and is unable to pay the fees of such witnesses. See Note to Subdivision (b) Advisory Committee on Rules of Rule 17. The motion to subpoena James T. Mathewson, Doris Peterson and Raymond Trafton was heard December 26, 1947, at which time the Court required appellant to support this motion by affidavit showing the materiality of the testimony of Peterson, Trafton and Mathewson. No such supporting affidavit appears in the praecipe or anywhere in the record. Nor is there a request for it. An examination of the District Court file (No. 2418-B) fails to reveal any affidavits setting forth the required information. Appellant does not in his brief refer to such an affidavit, or point out the expected testimony. It is quite apparent from these facts that no affidavit as required by law was ever filed to support the motion.

Therefore, appellant not complying with the law by filing supporting affidavits setting forth the names and addresses of the witnesses, substance and materiality of the testimony expected from each was not entitled to the relief sought.

Casebeer v. Hudspeth, Warden (C.C.A.-10) 121 F 2d 914, conforming to mandate of Sup. Crt. 312 U.S. 662, Rehearing Den. 317 U.S. 704.

Appellant had a right "to have compulsory process for obtaining witnesses in his favor", United States Constitution, Amendment VI, and (18 U. S. C. A. 563) 18 U.S.C. 3005. This included the issuance and service of process, but did not require pay-

ment by the Government of expenses of the witnesses. *Casebeer v. Hudspeth*, (C.C.A.-10) 121 F 2d 914, Cer. Den. 316 U.S. 683; Rehearing Denied 317 U.S. 704.

The Court in instant case did not refuse to issue a subpoena and afford compulsory attendance of witnesses in favor of appellant. It only refused to require their attendance at Government expense. The duty of the Court in this regard has been defined several times by the Supreme Court and Appellate Courts. In every instance it has been held that refusal to grant the relief sought in instant case "at Government expense" was wholly discretionary with the Court.

The Supreme Court of the United States in *Goldsby, alias Cherokee Bill v. United States*, 160 U.S. 70 stated that "the right to summon witnesses at the expense of the Government is by the statute, Rev. St. No. 878, left to the discretion of the trial Court, and the exercise of such discretion is not reviewable here." *Crumpton v. United States*, 138 U.S. 361, 364, which expressed a similar view is cited as authority.

Both the statutory language and court interpretation of the previous and existing law applicable here vest the trial court with discretion, which is not subject to review by the appellate court.

Rule 17 (b) of Federal Rules of Criminal Procedure, aside from judicial interpretation, makes it discretionary with the trial courts in affording compulsory attendance of witnesses, at Government expense, in behalf of indigent defendants. The language is clear

from the first sentence of the rule which provides "The court *may order* (emphasis added) at any time that a subpoena be issued upon motion or request of an indigent defendant." This language is similar to the law 28 U.S.C.A. 656, in force at the time of the adoption of the Rule. Pertinent language in that statute was that the court "*may order* that such a witness be subpoenaed if found within the limits aforesaid." (emphasis added). The present law though phrased differently, changes the former law only by extending the place of service of the subpoena to any place within the United States, instead of former limitations of within the district in which the court was held, or within 100 miles of the place of trial. See note to Subdivision 17 (b) of Rule 17 of Federal Rules of Criminal Procedure. The discretionary authority of the court in refusing such compulsory attendance of witnesses for defendants at Government expense has not been changed. Then by giving meaning and effect to Rule 17 (b) it must be interpreted as 28 U.S.C.A. 656 has heretofore been construed by the Courts.

Dupuis v. United States (C.C.A.-9) 5 F 2d 231 in construing 28 U.S.C.A. 656 held refusal of the trial court to procure the attendance of a witness in favor of the defendant, at Government expense, not error, said "That the matter of such procurement was within the discretion of the court, is both statutory and settled by the Courts."

Austin v. United States (C.C.A.-9) 19 F 2d 127,

Cert. Den. 275 U.S. 523 held failure to subpoena a witness for defendant at Government expense was "not subject to review by an appellate Court."

Other cases holding refusal of trial Courts to grant such relief is a matter for the trial Courts discretion are:

Brewer, et al v. United States (CCA-9) 150 F 2d 314

Gates v. United States (CCA-10) 122 F 2d 571, Cert. Den. 314 U.S. 662.

United Staes v. Best (D.C. Mass.) 76 F. Sup. 138

The suggestion by appellant in his brief that the expected testimony of Raymond Trafton, James T. Mathewson and Doris Peterson was material is answered under Issue II of this brief. The evidence alluded to by counsel appears to have been the testimony of these witnesses in the first trial. All of that evidence with the exception of Raymond Trafton relates to the details of the altercation between appellant and witnss Hartness January 8, 1946, which was held not admissible as evidence to show interest, bias, prejudice or hostility of the Government witness.

Clark v. State (Crt. Cr. Ap. Tex.) 148 S.W. 801

Figueroa v. State (Crt. Cr. Ap. Tex.) 159 SW 1188

Lau Fook Kau v. United States (CCA-9) 34 F 2d 86

Sneed v. State (Sup. Ct. Ariz.) 14 Pac. 2d 248

People v. Vertrees, (Sup. Ct. Cal.) 146 Pac. 890
McDuffie v. State (Sup. Ct. Ga.) 48 S.E. 708
Sasser v. State (Sup. Crt. Ga.) 59 S.E. 255
Eugee v. State (Sup. Ct. Ga.) 126 S.E. 471
People v. Strauch (Sup. Crt. Ill.) 93 N.E. 126

Appellant cannot complain of the absence of witness Raymond Trafton, in view of his failure in complying with the law in seeking his attendance as a witness, and further, in view of the Court's discretion in requiring his attendance at Government expense, the exercise of which is not subject to review.

Casebeer v. Hudspeth, Warden (CCA-10), Supra
Goldsby, alias Cherokee Bill v. United States, Supra
Dupuis v. United States (CCA-9), Supra

Furthermore, no contention was ever made, nor is it made now on appeal, that Raymond Trafton would furnish evidence other than that related by him in the first trial of the case. His testimony given in the first trial was available and in fact was read to the jury (Tr. P. 912) upon an agreed stipulation between the prosecution and the defendant.

IV

NO PREJUDICIAL ERRORS WERE COMMITTED BY THE TRIAL COURT AND THE DEFENDANT RECEIVED A FAIR AND IMPARTIAL TRIAL UNDER THE ADVERSARY THEORY OF LITIGATION.

(1) The appellant complains that the opening statement of the United States Attorney to the jury at the outset of the trial wherein he made reference to the case being up for re-trial after reversal on a legal technical matter amounted to a denial of substantive rights of the defendant. It is submitted that these words were not improper, that they were intended only to explain to the jury the reason for re-trying a previously convicted accused, and that under no circumstances could any other impression reasonably be gained by the jury.

It has been held not only proper but necessary for a prosecuting attorney on the re-trial of a case in his opening stattment to tell the jury of the previous conviction of accused and reversal by an appellate court.

Stanley v. State (Ark) 297 S.W. 826

The Supreme Court of Arkansas said in *Stanley v. State*, Supra:

> The object of the statement is to enable the court and jury to more readily understand the issues to be tried and the evidence subsequently adduced.

Likewise, much discretion as to what may be stated by the prosecuting attorney is given to the trial court. The trial court should always see to it that the prosecuting attorney acts in good faith in making his opening statement.

McFalls v. State 66 Ark. 16, 48 S.W. 492
Coats v. State 101 Ark. 51, 141 S.W. 197
Mode v. State 169 Ark. 356, 275 S.W. 700

It is respectfully submitted that on the facts and the law the trial court did not abuse its discretion in the case at bar.

(2) The appellant's second point under its fourth and last general specification of error concerns the trial court's allowing the prosecution to "elicit" testimony from Government witness Hartness which differed from his testimony at the first trial, with reference to the particular time of day of a certain occurrence. The fact that there is some conflict in the testimony of a witness does not deprive it of its probative value.

State v. Coomer 105 Vt. 175, 163 A 585, 94 ALR 1038

The question presented by conflict between testimony of a witness and his statements, made at some other time or in some other trial is one of his credibility which belongs to the province of the jury.

58 Am. Jur. Sec. 863, P 492

Since the testimony referred to as "elicited" was adduced in the regular procedure of the trial on his examination every opportunity to cross-examine the witness as to the discrepancy between his former testimony and his present was available as well as the right to properly comment thereon in argument.

(3) Since appellant's third point under its fourth general specification of error is substantially a restatement of its specification of Error No. II, we refer to our answer to specification of Error No. II, in this brief. Appellant further states that the attitude of the trial court and its several rulings in favor of the Government resulted in deprivation of a fair trial to the accused, without attempting to specify the rulings it refers to, and without citing authorities in support of its assertion. It is most strongly denied that the rulings of the trial court were based on a mistaken view of the law and it is respectfully contended rulings of the trial court were in accordance with the law and fair and proper.

(4) Appellant contends in his fourth point under his specification of Error No. IV that the trial court committed prejudicial error in limiting cross-examination of witness Lena Brown as to her physical condition at times other than those concerned with events relating to her testimony and beyond the limit of matters brought out on direct examination. In support of their contention they cite Wigmore on Evidence, Vol. III, Section 934 and the case of *Alleman v. Stepp*, 52 Ia. 627; 3 N.W. 636 cited under said section, which deals generally with evidence of diseased impairment of the testimonial powers, drug addicts and mental derangements. The apparent attempt to picture witness Lena Brown as a diseased and mentally deranged person or possibly as a drug addict is not borne out by the record. As to the length of her illness, which regardless of the

primary cause resulted in an upset stomach and vomiting, the record reflects she was ill about two days, December 8 and 9, 1945, and was well on Monday, December 10, 1945. On cross-examination Lena Brown testified, "I wasn't sick Friday." (Tr. P. 595 Line 16) Also on cross-examination when questioned, "When did you get well?" She testified, "Monday afternoon." (Tr. P 595 Line 12, 13) When questioned on cross-examination about having taken tablets she testified as follows:

"Did you say you were sick and had taken tablets and were asleep?" (Tr. P 593 Line 24, 25) Lena Brown replied: "I did later." (Tr. P 594 Line 1) With further reference to the record Lena Brown testified, "—— The doctor gave me some pills for my nerves and for me to sleep, and I took *one*, I believe. I don't remember when——." (Tr. P 596 Line 2, 4)

It is respectfully submitted that the facts in the case at bar do not warrant the finding that witness Brown was suffering from any diseased impairment of her mental faculties or that she was a morphine or other drug addict, as discussed in Wigmore at Section 934 and cited by appellant.

Lena Brown testified concerning Sunday evening, December 9, that she was "Just sleepy. I was all tired out." (Tr. P 596 Line 22)

It is submitted that the trial court was most liberal in permitting a searching cross-examination of Lena

Brown as to her physical and mental condition and in its sound discretion committed no error in refusing to permit the cross-examination on this subject to extend to prior times wholly disconnected with and unrelated to the events concerned with her testimony. The exact extent to which cross-examination respecting collateral matters may go rests almost entirely in the discretion of the trial court.

58 Am. Jur. Sec. 624
Johnston v. Jones 1 Black (U.S.) 210, 17 L ed. 117
Re Dolbeer, 149 Cal. 227, 86 P 695
Shailer v. Bullock, 78 Conn. 65, 61 A 65

Since from the nature of the case no fixed rule can be devised defining the right and limiting the extent of irrelevant inquiry this must be determined by circumstances attending the paticular case on trial, and an appellate court will not interfere with the exercise of discretion by the trial court unless a clear abuse thereof appears.

58 Am. Jur. Sec. 624
Cochran v. United States 157 U.S. 286, 39 L ed. 704, 15 S. Ct. 628
Johnston v. Jones, Supra
Birmingham So. R. Co. v. Lintner, 141 Ala. 420, 38 So. 363, 109 Am. St. Rep. 40

(5) Appellant complains of the exclusion of evidence relating to the assault by appellant Meeks on

witness Hartness, and evidence of an alleged attempted suicide of Hartness, and in particular exclusion of testimony of Doris Peterson Pineda (Tr. Vol. IV, P 993) concerning the latter point. These events were not associated with nor related to any fact described by the witness, or conversations had with the defendant concerning any issue in the case, and the reasons for exclusions of these collateral facts are discussed under Issue Number II. The court is referred to that section for the arguemnt. Furthermore, it is a fundamental principle of law that the "capacity of a person to act as a witness"(quoting from Page 59 of appellant's brief) or in other words, competency of a witness to testify, because of "emotional and mental instability" or any other reason is for the Court to decide and not the jury. Thus the rights of the defendant were not prejudiced in this respect.

(6) Appellant complains that Government witness William E. Didelius invaded the province of the jury in being allowed to state that the clothes worn by deceased at the time of his death did not have any evidentiary significance. It is respectfully submitted that this was not prejudicial to appellant. The witness was questioned at length by appellant on cross examination as to the condition of victim's clothes, and the fact of an examination by the F.B.I. Laboratory. The laboratory tests were not the subject of direct examination up and until the cross examination. The effect of the witness' testimony was that the clothes did not prove to be of any significance from his investi-

tion of the case and results of the laboratory examination. Though objected to by appellant, he later brought out on re-cross examination the information on which the witness based his conclusion. (Tr. Vol. 1, p. 163 to 169, particularly p. 165-166).

It should be noted that the testimony of the witness (Tr. p. 901-909) was given in the absence of the jury during the argument on a motion for discovery made at the close of the Government's case, and related in particular as to whether the deceased clothes were in existence. (See Tr. Vol. IV, p. 892-909).

Then on cross examination of this witness, who appeared for the Government in rebuttal, counsel for appellant thoroughly examined him in the presence of the jury, as to the witness' opinion of the evidentiary value of victim's clothes, as well as the information in the F.B.I. Laboratory report. (Tr. Vol. VI, P. 1449 to 1452)

Appellant cannot complain of the fact that the Court asked Government witness L. W. Hines if, from his description of the nature of the glasses, the person for whom they were made had rather poor vision or unusually poor vision. (Tr. Vol. I, P. 199) The Court may ask witnesses, including witnesses for the Government, questions on matters material to the case.

State v. Scott (Supr. Crt. Mo.) 58 S.W. 2d 275, P. 281

People v. Moore (Supr. Crt. Mich.) 10 N.W. 2d 296

To contend that it was error for the Court to state during the trial of the case "I think I know the law" (Tr. Vol I, P. 199) is absurd. There is no more suggestion in such a remark, that counsel for defense doesn't know the law, than there is in denying a motion or overruling an objection made by counsel.

Thus it is respectfully submitted that neither the witness (Didelius) nor the Court erroneously and to the prejudice of appellant, invaded the province of the jury, and there was no error in the Court saying it understood the law.

(7) No error was committed by the Trial Court in granting the Government's motion to strike the testimony of Steve Chutuk, a Government witness. (Tr. Vol. VII, p. 1506 to 1510). The record amply shows that Chutuk had never discussed the facts he was relating with the United States Attorney, or anyone else, and that the Government was surprised by the statements made by the witness. No requests were made to cross examine the witness, and appellant made no objection to the motion.

Kuhn et al v. United States (CCA-9) 24 F 2d 910, Reh. Den. 26 F 2d 463, Cer. Den. 278 U.S. 605 was a case in which the United States Attorney was surprised by a witness called for the Government. He attempted to impeach the witness, over objection, by examining the witness as to previous contraditory statements. The Court stated that the practice was improper, but

held it was not prejudicial, in view of the fact that after a recess the United States Attorney on his own motion consented that the objections be sustained and that all the testimony be withdrawn from the consideration of the jury, which was done and the jury properly admonished.

Speaking on the same subject, Justice Hutcheson, in *Young v. United States* (CCA-5) 97 F 2d 200, Reh. Den. 97 F 2d 1023, a case in which the prosecution was surprised by the witness called for the Government, stated " . . . . *it is ordinarily the best practice,* if it can be effectively done, when a party shows that he has been surprised by the adverse testimony of a witness he has offered, to permit him to withdraw the witness and his testimony from the jury by having the whole evidence stricken from the record, as was done in *Kuhn v. U. S.*, 9 Cir. 24 F 2d 910. By this course, if the claim of surprise is made, as indeed it should be, only for the legitimate purpose of removing the prejudice of the surprising testimony and not for the purpose of getting the contradictory statements before the jury for their effect upon it, the purpose of protecting the party, who offered him, from injury at the hands of the witness is accomplished without complicating the issues or confusing the jury." (emphasis added)

CONCLUSION

No reversible error was committed by the Trial Court in this case. It was not improper for the Court

to permit the Prosecuting Attorney to question a Government witness on his examination in chief concerning witness' previous conviction especially where no objection was made and where on cross-examination defense attorneys examined witness in detail as to type of crime, sentence and conditions relating thereto. Nor was it error for the Court to limit the cross-examination of Government witness Hartness as to the details of an entirely collateral offense where the fact of such collateral matter was permitted to be shown enabling the jury thereby to fully appraise the testimony of the witness. Since no affidavit was filed as required by Rule 17 (b) of the Federal Rules of Criminal Procedure no complaint can be made of the Court's denial to grant defendant's motion to summon certain defense witnesses and it is respectfully submitted that the defendant received a fair and impartial trial under the adversary theory of litigation.

The judgment of the Trial Court should, therefore, be affirmed.

Respectfully submitted,

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